

Letter of Findings: 04-20130623
Gross Retail Tax
For the Years 2010, 2011, and 2012

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ISSUE

I. Gross Retail Tax – Audit Calculations.

Authority: IC § 6-2.5-2-1(a); IC § 6-2.5-2-1(b); IC § 6-2.5-9-3; IC § 6-8.1-5-1(c); IC § 6-8.1-5-4(a); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); [45 IAC 15-5-1](#).

Taxpayer argues that the Department of Revenue's audit methodology and calculations were faulty and resulted in an over-assessment of sales and use tax.

STATEMENT OF FACTS

Taxpayer is a combination gas station, delicatessen, and convenience store located in Indiana. The location sells gasoline, kerosene, but does not sell diesel fuel. The convenience store sells tobacco, groceries, newspaper, candy, soft drinks, lottery tickets, and the like.

The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's sales tax returns and business records. The audit resulted in an assessment of additional sales/use tax. Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

I. Gross Retail Tax – Audit Calculations.

DISCUSSION

The Department's audit of Taxpayer's convenience store transactions found that Taxpayer unreported the gross amount of those sales and over reported the amount of exempt convenience store sales. Taxpayer argues that the Department's audit employed faulty audit methods and calculations which resulted in the over-assessment of sales and use tax.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A retail merchant – such as Taxpayer – is required to "collect the tax as agent for the state." IC § 6-2.5-2-1(b). The retail merchant "holds those taxes in trust for the state and is personally liable for the payment of those taxes" IC § 6-2.5-9-3.

The audit found that Taxpayer's convenience store alone had \$4.3 million dollars in sales during the audit years. Taxpayer reported that more than \$1.7 million dollars (40 percent) of that amount came from exempt sales. The audit requested records to verify the amount of exempt convenience store sales. Taxpayer provided single-page summary reports for some of the months under audit. After reviewing the single-page summary sheets, the audit report noted that:

An examination of these sales reports revealed that the total, exempt and taxable amounts did not agree with the amounts per the sales tax returns.

The audit requested additional documentation in addition to the summary sheets in order to explain the discrepancies. "Additional records were requested for the detail of the 'nontax' / 'grocery' from the sales reports." However, "No numerical information was provided."

Insofar as the "exempt" sales amounts the audit stated that:

[R]ecords to substantiate the amounts for all of the sales returns were not provided. No detail of sales tax liability by individual transaction was provided to the audit. The information that was provided did not match what was reported on the sales tax returns.

Since Taxpayer's employees scanned individual items as they were sold, Taxpayer was asked whether inventory items may have been "miscoded" allowing items incorrectly being sold as "exempt." In addition, Taxpayer was asked whether inventory items were ever "rung up manually" leading to possible taxability errors. Taxpayer was not able to provide answers.

Given the ambiguity and insufficiency of the records, the audit concluded that Taxpayer had overestimated the amount of exempt sales and understated the amount of non-exempt sales.

[B]ecause certain detailed records were not provided, the [T]axpayer's exempt sales of merchandise are considered by audit to be 10[percent]. Anything above 10[percent] is being treated as taxable per this audit. The calculation is being made to apply the 10[percent] exemption to the adjusted total [convenience] store sales The taxable sales reported by the [T]axpayer would be subtracted from the adjusted taxable sales to arrive at additional taxable [convenience] store sales

In addition, the audit reviewed the "cost of goods sold" reported on Taxpayer's federal corporate tax returns. As originally reported, "the percentage of cost of goods sold to total sales was 90[percent] and 93[percent] for 2011." The audit noted that the 2012 federal income tax return had not yet been filed. The audit accepted the "cost of goods sold" reported on the federal return. However, having done so, the audit concluded "that the total sales amounts per the federal return information and the total [convenience] store sales amounts per the sales tax returns are understated" because "[t]here is an established percentage of cost of goods sold to total sales for food and beverage stores, which is 74[percent]."

As a business conducting retail transactions and collecting sales tax on behalf of the state, Taxpayer was required to maintain accurate financial records. "Every person subject to a listed tax must keep books and records so that the Department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records." IC § 6-8.1-5-4(a). "If the Department reasonably believes that a person has not reported the proper amount of tax due, the Department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the [D]epartment." IC § 6-8.1-5-1(b). See also [45 IAC 15-5-1](#).

Taxpayer argues that the audit erred in purportedly relying on BizStats.com to increase sales based on an average cost-of-goods of 74 based. Taxpayer states that, "There is no supporting evidence that BizStats.com is accurate, that BizStats.com drew from a sufficient sample size, or that BizStats.com has sufficient variety in its sample size." In addition, Taxpayer argues that the BizStats.com calculation is unreliable and "leads to a difference of nearly \$2 million between actual bank deposits and gross receipts."

Taxpayer argues that its bank deposit reports substantiate the amount of sales as originally reported, and that the auditor arbitrarily rejected Taxpayer's representation that 40 percent of its non-lottery convenience store sales were for exempt food items.

However, even accepting Taxpayer's post-audit argument, Taxpayer admits that it owes more than \$53,000 in additional sales tax.

Sales tax calculations aside, it is uncontested that Taxpayer failed to maintain source records necessary to determine definitively to what extent its convenience store sales were exempt or were non-exempt. Taxpayer prepared monthly summary sheets but apparently has nothing to verify those sheets. Taxpayer maintains that 40 percent of its convenience stores sales were exempt; the Department's audit disagreed stating that no more than 10 percent of its convenience store sales were exempt. Taxpayer now asks the Department to administratively determine definitely and accurately which of Taxpayer's convenience store sales – over a period of three years – were for exempt items (milk and bread) and which of Taxpayer's convenience store sales were for taxable items (candy, cigarettes, magazines).

Similarly, Taxpayer asks the Department to agree that Taxpayer reported the proper amount of gross sales, that the cost-of-goods-sold for its convenience items was between 90 and 93 percent, and that it therefore marked up its convenience store items between approximately 8 to 11 percent. In order to do so, the Department must reject the audit's determination – admittedly based on various "estimates" and accept Taxpayer's "estimates." In order to accept Taxpayer's argument, one must necessarily assume that its bank deposits records exactly match Taxpayer's gross receipts. In order to accept Taxpayer's argument, the Department must determine that the audit's reliance on the BizStats.com information is unreliable. In order to accept Taxpayer's argument, the Department must overlook the fact that Taxpayer freely admits that it underreported its sales tax liability by more than \$53,000.

Especially given the fact that Taxpayer failed to retain or preserve source documentation of its day-to-day transactions, it is not possible to conclude that Taxpayer has met its burden of demonstrating that the audit's conclusions were wrong as required under IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is respectfully denied.

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